No. 47768-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

BRUCE MORET,

Appellant,

vs.

BREEA GALE, SHERRI BENNETT, YWCA CLARK COUNTY,

Respondents.

RESPONDENTS' RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

I. INTRODUCTION

Bruce Moret, a former at-will employee of YWCA's management, filed suit alleging that the YWCA and several employees discriminated against him; treated him differently than similarly-situated members of the opposite gender; and that they wrongfully terminated his employment.

At the summary judgment proceedings, the YWCA presented *undisputed* evidence that Mr. Moret was terminated due to his lack of candor and exercise of poor judgment, which is contrary to the YWCA's core values of respect and empowerment. His absence of candor and judgment was revealed during an underlying investigation triggered by a complaint that he allegedly sexually harassed a subordinate employee.

Because Mr. Moret did not submit any admissible evidence, there were no genuine issues of material fact that: (1) Mr. Moret was an at-will employee and no exceptions to the at-will doctrine applied; (2) his position was filled by a member of the same gender after he was terminated; and (3) he was treated equally with similarly-situated members of the opposite gender, summary judgment dismissal was appropriate. Under de novo review, the dismissal should be affirmed.

II. NO ASSIGNMENTS OF ERROR

Respondents Breea Gale, Sherri Bennett, and the YWCA of Clark County (collectively "YWCA") respectfully submit that the trial court did not err when it dismissed Mr. Moret's claims of gender discrimination/disparate treatment and wrongful termination as a matter of law because Mr. Moret did not submit any admissible evidence to create a genuine issue of material fact to support each element of a prima facie case.

III. RESTATEMENT OF THE ISSUE

Under de novo review, should the Court of Appeals affirm the trial court's dismissal Mr. Moret's claims of gender discrimination/disparate treatment and wrongful termination as a matter of law because the undisputed evidence demonstrates that: (1) he was an at-will employee; (2) no exceptions to the at-will employee doctrine apply; (3) he was replaced by a male, thus he cannot establish a *prima facie* case of gender discrimination; and (4) the YWCA did not treat similarly-situated persons of the opposite gender more favorably or apply its workplace policies discriminately based on gender.

IV. RESTATEMENT OF THE FACTS

A. Facts Pertinent to the Appeal

In May 2010, YWCA Clark County hired Mr. Moret as its Director of

Finance and Administration, which is a senior management position. Clerk's Papers ("CP") 136, ¶ 2. His employment was "at will" as explained in the YWCA Employee Handbook and in YWCA's hiring letter to Mr. Moret. CP 139, ¶ 18; CP 227. Mr. Moret expressly acknowledged that "[t]he YWCA is an at-will employer and employees serve solely at the will of the organization. Any employee may be discharged at any time for any reason, unless such reason is prohibited by law." CP 227.

In 2012, YWCA Executive Director Sherri Bennett verbally communicated a policy on workplace relationships to all senior members of YWCA Clark County management, including Mr. Moret. CP 136, ¶ 3. This policy required that YWCA employees in positions of formal leadership refrain from dating or becoming romantically and/or sexually involved with any staff member they supervised. *Id.* The applicability of the workplace relationship policy was determined solely by an employee's status in the YWCA management hierarchy.

Bennett explained to Mr. Moret that—as the YWCA Director of Finance and Administration and a senior member of YWCA Clark County management—the workplace relationship policy applied to him. *Id.* Bennett did so, in part, because Mr. Moret previously had a relationship with a

YWCA employee that Bennett believed might not be in accordance with the letter and spirit of the workplace relationship policy. *Id.* Mr. Moret confirmed to Bennett that he understood the workplace relationship policy applied to him and he agreed to abide by it. *Id.*

In addition to Mr. Moret, the workplace relationship policy applied to all senior members of YWCA management, most of whom were female, including Natalie Wood as Director of Programs; Shawna Burkholder as Director of Development and Communications; and Sherri Bennett as Executive Director. CP 137, ¶ 4. At the summary judgment proceeding, it was undisputed that at no time has the workplace relationship policy been selectively applied or enforced on the basis of gender. *Id.*

In March 2013, recently hired YWCA employee, Barbara Kuzmic, verbally complained to her immediate supervisor, Natalie Wood, that she considered Mr. Moret's behavior toward her was violating YWCA's policy prohibiting sexual harassment. CP 137, ¶ 5. Wood advised Kuzmic to report her complaint to Director of Human Resources, Breea Gale, which Kuzmic did on March 27. CP 137, ¶ 6.

That same day, Bennett and Gale met with Mr. Moret to explain that a YWCA employee had accused him of violating the YWCA policy prohibiting

sexual harassment. CP 137, ¶ 7. Mr. Moret was told that the allegations would be investigated and reported upon by an independent, third-party investigator. *Id.* Mr. Moret was placed on immediate paid administrative leave. *Id.*

On April 1, Kuzmic submitted her written complaint to Bennett, describing Mr. Moret's alleged sexual harassment. CP 138, ¶¶ 9-10; CP 157-60. Kuzmic also described Mr. Moret's request to keep the details of their relationship hidden from their immediate supervisors. *Id.* In the management hierarchy, Kuzmic reported to Natalie Wood, and Mr. Moret (and Wood) reported directly to Bennett as Executive Director. CP 138, ¶ 9. In keeping with YWCA policy, the written complaint was not shared with Mr. Moret (although he would learn of Kuzmic's specific allegations during the subsequent investigation). CP 138, ¶¶ 8-9; CP 149. Bennett explained that Moret would <u>not</u> have received a written copy of the complaint, regardless of the accused or accuser's gender. CP 138, ¶ 9.

From April 10 through April 15, Dean Mitchell of Canfield Solutions conducted a third-party investigation into Kuzmic's sexual harassment complaint. CP 138, ¶ 11. Along with other interviews of YWCA personnel, Mitchell interviewed Kuzmic on April 10, and Mr. Moret on April 11. *Id.* In

her interview, Kuzmic again described Mr. Moret's request to keep details of their relationship hidden from their supervisors. CP 138-39, ¶ 12-13; CP 166-67. Likewise, Mr. Moret admitted in his interview that he requested that Kuzmic keep details of their relationship hidden from her immediate supervisor, Natalie Wood. CP 139, ¶ 14-15; CP 215. Mr. Moret responded to the investigator as follows:

Q: Okay. But you're not denying the fact that you told her that you probably shouldn't tell Natalie that you guys were together? Yes or No.

A: Yes.

Q: And the reason for that was?

A: Uh, I don't know. I don't have a good excuse for that.

Q: Okay. Could it be because you didn't want people to know?

A: No. Because, uh, I, I wanted people to know. I just didn't want Natalie to, uh, to have to approve it.

CP 215. During the interview, Mr. Moret also confirmed that Bennett spoke with him in 2012 regarding the workplace relationship policy; he described it as being told that he could not date subordinate employees. CP 139, ¶¶ 14-15; CP 208; CP 215.

On April 15, Mitchell shared his conclusion with Bennett that Kuzmic's allegations of sexual harassment could not be substantiated, but

that Moret had used poor judgment in suggesting that Kuzmic be secretive about their relationship. CP 139, ¶¶ 16-17; CP 225 ("Mr. Moret acknowledged that he informed Ms. Kuzmic that 'it would be easier if she did not tell anyone' about their relationship. This implies he suspected his behavior was inappropriate. At the very least, he used extremely poor judgment.")

The investigator further concluded that Mr. Moret had violated the directive not to date subordinate employees, reasoning that Mr. Moret's representation that he was simply trying to cultivate a friendship was difficult to believe. CP 139, ¶ 16. Mitchell also confirmed that he was not asked to render any opinion as to the outcome of the investigation or recommend any course of action. *Id.*

On April 23, Bennett provided a letter to Mr. Moret communicating her decision to terminate his employment with YWCA Clark County. CP 140, ¶¶ 20-21; CP 229. The authority and decision to terminate Mr. Moret was Bennett's alone. CP 140, ¶ 20. Bennett did not reach any conclusions about whether Mr. Moret had sexually harassed Kuzmic; violated the workplace relationship policy; or "dated" Kuzmic. *Id.* Likewise, these concerns did not factor into her decision to terminate Mr. Moret's

employment. *Id.*

Instead, Bennett terminated Mr. Moret because she felt that his admission that he requested that Kuzmic keep details of their relationship hidden from her immediate supervisor, Natalie Wood, conflicted with the YWCA's core values of respect and empowerment. *Id.* Bennett felt Mr. Moret exercised poor judgment to an extent that fell below the expectations for senior YWCA Clark County management (*i.e.*, by requesting a relatively new subordinate employee to be secretive and less than candid with her supervisor). *Id.* Executive Director Bennett stated under oath that Mr. Moret's termination was not based upon his gender because she would have terminated any other similarly-situated senior member of YWCA Clark County management for similar behavior irrespective of gender. *Id.*

Mr. Moret's immediate successor was a male, Paul Lewis, who served as a contracted Certified Public Accountant during a transition period while YWCA Clark County sought a permanent Director of Finance and Administration. CP 140-41, ¶ 22. Neville Wellman, a male, was offered and accepted the position of Director of Finance and Administration in late July 2013. *Id.* However, Mr. Wellman resigned his position before starting. *Id.* Ultimately, the YWCA changed the position to "Director of Accounting,"

with reduced supervisory responsibilities and hours. *Id.* The new position was filled by Angie Holden, a female, in December 2013. *Id.*

B. Procedural History

Mr. Moret filed a claim with the United States Equal Employment Opportunity Commission, which issued a Dismissal and Notice of Rights letter on December 6, 2013. CP 135. On January 27, 2014, Mr. Moret filed a complaint with the Superior Court, asserting: (1) gender discrimination – disparate treatment, and (2) wrongful termination. CP 132-33.

The YWCA moved for summary judgment dismissal, contending that Mr. Moret could not establish the elements essential to his causes of action, namely: (1) that his termination resulted from discrimination based on his gender; or (2) that the YWCA workplace policies were discriminately applied based on his gender; and (3) that the exceptions to Washington's doctrine of at-will employment applied. CP 230-50. YWCA's motion for summary judgment dismissal was supported by the un-rebutted declaration of Sherri Bennett. On May 29, 2015, Clark County Superior Court, after finding no genuine issues of material fact, granted YWCA's motion as a matter of law. CP 31-32.

On June 26, Mr. Moret filed a Notice of Appeal, appealing only the order granting summary judgment dismissal (and not an earlier order denying joinder).[1] CP 33-36. Over the interim of Mr. Moret's appeal, he has filed at least three corrected or amended opening briefs.[2] The most recent iteration was filed on December 24, 2015. Notably, his Opening Brief does not cite to the Clerk's Papers and differs significantly from his Opposition to the YWCA's motion for summary judgment.

V. LEGAL ARGUMENTS

A. THE STANDARD OF REVIEW GOVERNING SUMMARY JUDGMENT IS DE NOVO.

A motion for summary judgment is reviewed *de novo*. *Hadley v. Maxwell*, 144 Wn.2d 306, 310-11, 27 P.3d 600 (2001). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P.3d 894 (2002). In responding to a challenge to the sufficiency of prima facie evidence, the plaintiff may not rely

[1] On February 6, 2015, the trial court denied Moret's motion for permissive joinder of his lawsuit against Kuzmic to his lawsuit against the YWCA. CP 19; CP 20-23. Moret's Notice of Appeal only designates the order granting YWCA's motion for summary judgment. CP 33-36.

[2] On September 24, 2015, the Court of Appeals admonished Moret for failing to file a brief that conformed with the Rules of Appellate Procedure. Moret refiled a defective opening brief, and the Court again admonished him on October 7. He failed to timely refile a corrected brief, and was subject to sanctions or dismissal on December 16. He finally refiled

on the allegations in the pleadings, but must set forth specific facts by affidavit or otherwise showing that genuine issue exists. *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Any such affidavit must be based on personal knowledge admissible at trial and not merely conclusory allegations, speculative statements, or argumentative assertions. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

Summary judgment should be granted only if reasonable persons could reach but one conclusion after considering the evidence presented in the light most favorable to the nonmoving party. *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992).

The party moving for summary judgment has the initial burden of demonstrating an absence of any genuine issue of material fact and an entitlement to summary judgment as a matter of law. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). "Thereafter, the nonmoving party must set forth specific facts evidencing a genuine issue of material fact for trial." *Id.* A material fact is one upon which the outcome of the litigation depends. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

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his revised opening brief, but the brief still failed to appropriately cite to the record on review.

"[I]n order for a plaintiff alleging discrimination in the workplace to overcome a motion for summary judgment, the worker must do more than express an opinion or make conclusory statements." *Marquis v. City of Spokane*, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). To defeat summary judgment, the employee must establish specific and material facts to support each element of her prima facie case. *Id.*

Here, the YWCA relied upon the evidence submitted in the Declaration of Sherri Bennett with attachments. Conversely, Mr. Moret did not rebut her declaration, submit contrary evidence, or establish specific and material facts to support each element of his prima facie case. Instead, his Opposition relied on inadmissible speculation and conclusions.[3] CP 269-75.

B. RAP 9.12 GOVERNS THIS APPEAL.

RAP 9.12 is a special rule for order on summary judgment and states as follows:

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence

[3] To the extent that his Opposition could be read as a Declaration, it is still legally defective because it is not made under oath or penalty of perjury.

> called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

RAP 9.12 (emphasis added). Here, the appellate court may only consider documents listed in the Court's Order at CP 35-36. But Mr. Moret's Opening Brief contains arguments and new facts not called to the attention of the trial court, and should be disregarded by this Court. Mr. Moret's opposition brief at the summary judgment hearing is at CP 269-75. Under RAP 9.12, the Court of Appeals is limited to reviewing YWCA's moving papers and declarations in support of same, Mr. Moret's opposition, and YWCA's reply.

C. *PRO SE* LITIGANTS ARE BOUND BY THE SAME PROCEDURAL AND SUBSTANTIVE LAW AS AN ATTORNEY

Mr. Moret is a *pro se* litigant. *Pro se* litigants are held to the same standard as attorneys; they are bound by the same procedural and substantive law as everyone else. *Bly v. Henry*, 28 Wn. App. 469, 471, 624 P.2d 717, 718 (1980); *see also In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (A litigant appearing *pro se* is bound by the same rules of procedure and substantive law as his or her attorney would have been had the litigant chosen to be represented by counsel.)

D. THERE WERE NO GENUINE ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT DISMISSAL OF MR. MORET'S GENDER DISCRIMINATION AND DISPARATE TREATMENT CLAIMS

Mr. Moret alleged "gender discrimination – disparate treatment," although he did not identify the legal authority upon which he relied. CP 132. The YWCA will address Mr. Moret's claim as though it is brought pursuant to both the Civil Rights Act of 1964 and the Washington Law Against Discrimination ("WLAD"). The federal statute states in pertinent part:

> It shall be an unlawful employment practice for an employer . . .to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .

42 U.S.C. § 2000e-2 (a)(1). Similarly, the WLAD states in relevant part:

> The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to [t]he right to obtain and hold employment without discrimination . . . .

RCW 49.60.030. Both statutes provide protection from discrimination on the basis of sex, otherwise known as gender.

The framework for analyzing both the burden and order of proof in

actions alleging gender-based discrimination pursuant to the federal statute is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Likewise, Washington Courts rely on the *McDonnell Douglas* scheme when evaluating summary judgment motions in employment discrimination cases under WLAD. *Fulton v. DSHS*, 169 Wn. App. 137, 148, 279 P.3d 500 (2012). Thus, the *McDonnell Douglas* test governs Mr. Moret's claim of discrimination sounding in both federal and state law.

1. Mr. Moret failed to establish a *prima facie* case of discrimination based on his gender.

In the trial court, Mr. Moret had to carry the initial burden under the state or federal statute of establishing a *prima facie* case of gender discrimination. *McDonnell Douglas*, 411 U.S. at 802. "To establish a *prima facie* sex discrimination case, a plaintiff must show that she: (1) is a member of a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a person of the opposite sex or otherwise outside the protected group." *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 80, 98 P.3d 1222 (2004). In so doing, "an employee 'must do more than express an opinion or make conclusory statements.' The employee must establish *specific and material facts* to support each element of her prima

facie case." *Fulton*, 169 Wn. App. at 147 (emphasis in original) (*quoting Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992)).

Here, Mr. Moret could not meet the fourth element of his *prima facie* burden by showing that he was replaced as Director of Finance and Administration by a woman. The unrebutted evidence demonstrates that Mr. Moret was immediately replaced by another man, Paul Lewis, who was himself replaced by another man, Neville Wellman.[4] CP 140-41. Just as the female plaintiff in the *Domingo* matter could not meet her *prima facie* burden because she could not show she was replaced by a man (and was, in fact, replaced by a woman), so too does Mr. Moret fail to meet his *prima facie* burden where he cannot show he was replaced by a woman (because he was, in fact, replaced by a man). *Domingo*, 124 Wn. App. at 80-81. Mr. Moret did not submit admissible evidence rebutting the fourth element. As a result, Mr. Moret's discrimination claim necessarily failed as a matter of law.

Mr. Moret's companion claim of disparate treatment on the basis of gender likewise fails. A *prima facie* showing of disparate treatment requires proving the same first three elements set forth above, plus proving the fourth

[4] While it is true that a woman (Angie Holden) was ultimately hired to perform accounting services for YWCA Clark County, the law does not require that an employee refrain from hiring the opposite gender into perpetuity. Such a strained interpretation would lead to absurd results. Moreover, Holden did not "replace" Moret, but rather occupies a newly-created position with less responsibility and hours worked than the position formerly held by Moret.

element of different and more favorable treatment of similarly-situated persons of the opposite sex. *Domingo*, 124 Wn. App. at 80; *see also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002). Mr. Moret's disparate treatment claim fails because he could not show that the YWCA treated similarly-situated women (*i.e.*, women employed by YWCA Clark County as senior members of management) more favorably.

Mr. Moret alleged that he was the only person subjected to a "verbal dating rule," yet similarly-situated women of YWCA Clark County's senior management (Natalie Wood as Director of Programs, Shawna Burkholder as Director of Development and Communications, and Sherri Bennett as Executive Director) were equally subjected to the same rule. CP 4, ¶ 3.1; CP 137, ¶ 4. In fact, this workplace relationship policy has never been selectively applied or enforced based gender. *Id.* On the contrary, it is enforced based on executive membership. *Id.*

Mr. Moret also alleged that Kuzmic received no reprimand for accusing him of sexual harassment while he was terminated for unsubstantiated allegations. CP 4, ¶ 3.5. But this purely speculative argument intentionally misrepresents the express reasons provided to Mr. Moret for his termination. Mr. Moret was <u>not</u> terminated for allegedly sexually harassing

Kuzmic, but rather for encouraging a lack of candor. CP 140, ¶¶ 20-21; CP 229. Even if Mr. Moret had been terminated on suspicion of sexual harassment, this would not support his claim of disparate treatment as he and Kuzmic were not similarly-situated members of senior management.[5]

Mr. Moret contends that there were cross-complaints of harassment and discrimination filed between two female management team members in 2010, and that neither was terminated. CP 4, ¶ 3.7. Again, this argument is unavailing because: (1) there is no evidence that these persons were similarly-situated members of senior management; and (2) there is no evidence of similar circumstances wherein either employee encouraged a subordinate employee to remain secretive as they attempted to negotiate around a workplace policy.

It is uncontroverted—and Mr. Moret did not dispute—that Bennett would have terminated any other similarly-situated senior member of YWCA Clark County management who engaged in Mr. Moret's devious behavior regardless of their gender. CP 140, ¶ 20.

Mr. Moret's complaint and summary judgment response is based on personal opinions and speculative conclusions. However, under *Fulton*, Mr.

[5] Moret was a co-equal to Natalie Wood, Director of Programs, who was Kuzmic's supervisor. CP 200-01. Both Moret and Wood reported directly to Executive Director Sherri Bennett. *Id.*

Moret must submit specific and material facts to support each element of a *prima facie* case for his claims of gender-based discrimination and disparate treatment to survive summary judgment. *Fulton*, 169 Wn. App. at 147. If a plaintiff fails to do so, "the defendant is entitled to judgment as a matter of law." *Id* at 148. Mr. Moret has so failed, and his gender discrimination claim was dismissed. The dismissal should be affirmed.

2. The YWCA had legitimate, non-discriminatory reasons to terminate Mr. Moret, and he submitted no admissible evidence that these reasons were merely a pretext for a discriminatory motive.

Only if "the plaintiff succeeds in establishing a prima facie case, a 'legally mandatory rebuttable presumption' of discrimination *temporarily* takes hold and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse action."[6] *Fulton*, 169 Wn. App. at 149 (emphasis in original). "[I]f the defendant provides a nondiscriminatory reason for its employment action, the presumption established by the plaintiff's prima facie case is rebutted and it 'simply drops out of the picture.'" *Id* (*quoting Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006)). "The burden then shifts back to the

plaintiff to show that the defendant's reason is actually pretext for what, in fact, is a discriminatory motive." *Id.* "Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial." *Villiarimo,* 281 F.3d at 1062 (emphasis added). "If the plaintiff fails to make this showing, the defendant is entitled to judgment as a matter of law." *Fulton*, 169 Wn. App. at 149.

Bennett explained that she terminated Mr. Moret because she felt that his admission that he requested that Kuzmic keep details of their relationship hidden from her immediate supervisor, Natalie Wood, was in derogation to YWCA's core values of respect and empowerment. And Mr. Moret was unambiguously told the reason for his termination even if he chose to disbelieve it.

Encouraging the dishonesty of a fellow employee is a legitimate, non-discriminatory reason for any employer to terminate an employee, and any argument to the contrary is facetious. In the summary judgment proceeding, Mr. Moret did not offer legal authority for the proposition that the proffered reason for his termination was illegitimate and discriminatory, nor could he offer specific and substantial evidence that the reason was pretextual.

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[6] This Court should affirm the trial court's dismissal because Moret failed to make a *prima facie* showing. Accordingly, the next portion of the *McDonnell Douglas* burden-shifting analysis should not be entertained.

In sum, Mr. Moret did not establish "either . . . a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Villiarimo*, 281 F.3d at 1063 (*quoting Chuang v. University of California Davis*, 225 F.3d 1115, 1123 (9th Cir. 2000)).

Like the plaintiff in *Villiarimo*, Mr. Moret was terminated for perceived dishonesty in the form of encouraging a subordinate employee to stay quiet about a workplace relationship that might be considered in violation of the spirit, if not the letter, of a workplace relationship policy to which Mr. Moret was indisputably bound. Mr. Moret, in his interview with the investigator Dean Mitchell, could not explain his lack of transparency:

> MITCHELL: Okay. But you're not denying the fact that you told her that you probably shouldn't tell Natalie [Natalie Wood, Director of Programs and a member of senior management like Moret] that you guys were together? Yes or no.
>
> MORET: Yes.
>
> MITCHELL: And the reason for that was?
>
> MORET: Uh, I don't know. I don't have a good excuse for that.

(CP 215) While YWCA Clark County did not conclude that any actionable

harassment had occurred, Mr. Moret's own interview testimony created lingering unease about his influence over Kuzmic. And his entreaty to Kuzmic to remain silent and not report anything to Wood was a source of concern for Executive Director Bennett – not because Mr. Moret was male, but because Mr. Moret was a senior member of management exerting subtle pressure on a subordinate employee.

Just as in *Villiarimo*, concerns about Mr. Moret's honesty, judgment, and commitment to the company's core values are legitimate, non-discriminatory reasons for his termination. As a result, Mr. Moret cannot show that the proffered justification for his termination was pretextual. His claim for relief under Title VII and/or WLAD was flawed at several junctures of the *McDonnell Douglas* analysis, and was properly dismissed as a matter of law. The Court of Appeals should affirm the dismissal.

E. THERE WERE NO GENUINE ISSUES OF MATERIAL FACT TO PRECLUDE SUMMARY JUDGMENT DISMISSAL OF MR. MORET'S WRONGFUL TERMINATION CLAIM.

Since 1928, Washington has ascribed to the doctrine of at-will employment. Under that doctrine, an employer can discharge an employee with or without cause. *Roe v. TeleTech Customer Care Mgmt. (Colo.) LLC,* 171 Wn.2d 736, 754-55, 257 P.3d 586 (2011), *Snyder v. Med. Serv. Corp.,*

145 Wn.2d 233, 238, 35 P.3d 1158 (2001); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). There is no dispute that Mr. Moret's employment with YWCA Clark County was at-will. CP 139-40, ¶¶ 18-19; CP 227.

Washington recognizes four narrow exceptions to the at-will doctrine. The first exception applies when there is an express or implied contract that an employee will only be discharged for cause. *Thompson*, 102 Wn.2d at 233. The second exception applies when the employee gives consideration to the employer thereby creating an agreement that the employee will only be discharged for cause. *Id.*

The third exception occurs when an employer issues an employment manual to the employee that contains promises of specific treatment in specific situations, thereby modifying the at-will relationship and creating a right to sue if the employer fails to adhere to those promises. *Id* at 229, 233. To prove that this exception applies, "the employee has to establish such a promise contained in an employment manual or handbook or the like, the employee's justifiable reliance, and the breach by the employer." *DePhillips v. Zolt Constr. Co.,* 136 Wn.2d 26, 36, 959 P.2d 1104 (1998).

The fourth exception arises when "the discharge contravenes a 'clear

mandate of public policy.'" *Snyder,* 145 Wn.2d at 238-39; *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 152, 43 P.3d 1223 (2002). To establish a claim of wrongful discharge that violates public policy, a plaintiff must prove: (1) that a clear public policy exists; (2) that discouraging the plaintiff's conduct would jeopardize that public policy; (3) that the plaintiff's "public-policy-linked conduct caused the dismissal;" and (4) that the defendant cannot justify the dismissal. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

In the case at bar, Mr. Moret's cause of action for wrongful termination alleges that the YWCA: (1) did not have grounds to believe that sufficient cause existed to justify the termination (seemingly relying upon either of the first two exceptions by use of the word, "cause"), and (2) did not follow the handbook policy on conflict and problem resolution (read by these Respondents as an argument for applicability of the third exception.) *See* CP 5, ¶¶ 4.2, 4.4. There is simply no evidence establishing the operation of any of these exceptions.

Further, Mr. Moret's complaint does not allege (and there is no evidence of) an express or implied contract that he would only be discharged for cause. On the contrary, the YWCA Clark County Employee Handbook

specifically states:

> Neither these policies nor any other communication by any management representative, either written or oral, made at the time of hiring or during the course of employment is intended in any way to create an employment contract. YWCA Clark County is an "at will" employer, which means that either the employee or the employer can terminate the employment relationship at any time, **with or without cause**, and with or without notice.

CP 145. The complaint nowhere alleges and there is no evidence that Mr. Moret gave consideration to YWCA Clark County in exchange for converting his at-will employment to employment whereby he could only be discharged for cause. The first two exceptions to the at-will doctrine clearly do not apply.

Mr. Moret's complaint alleges that Bennett and Gale did not follow the handbook policy on conflict and problem resolution. CP 5, ¶ 4.4; CP 155. But this provision of the employment manual does not contain promises of specific treatment in specific situations that would give Mr. Moret the right to sue if YWCA Clark County failed to abide by those promises. The relevant policy reads:

> YWCA Clark County believes that most conflict and problem situations can be resolved by promoting open communication between an employee and her/his immediate supervisor, and by taking prompt action to resolve a situation. It is the policy of YWCA to promote the resolution of problem situations in an Informal discussion between the employee and her or his

> immediate supervisor.
>
> If the employee and her or his immediate supervisor are unable to resolve the problem situation, they are encouraged to talk with the next succeeding levels of management up to the executive director to receive assistance in resolving the problem situation.
>
> Any staff member who reports negligent waste, fraud, or abuse will not have their employment terminated or be otherwise harassed or retaliated against for making the report. The Whistle-blower Policy outlines the procedures and guidelines for reporting suspected or identified instances of negligent waste, fraud or abuse.
>
> Further information on this policy or procedures for reporting may be obtained from the HR Department.

CP 155. Leaving aside the obvious notion that this provision does not apply to allegations of sexual harassment as addressed in a separate policy, there is simply no mandatory language promising Mr. Moret an informal discussion with his immediate supervisor, Executive Director Bennett, and creating a right to action in the event that an informal meeting is not provided. Open communication is promoted, not promised; meetings between employees and their supervisors are encouraged, not promised. The third exception to at-will employment also does not apply.

Finally, Mr. Moret did not allege in his complaint that the YWCA violated a clear mandate of public policy. Where a plaintiff seeking to rely

on the public policy exception to the at-will doctrine fails to even *assert* that his or her discharge violated a legislatively or judicially recognized public policy, the wrongful discharge claim will be dismissed for failure to state a claim for relief. *See e.g., Snyder,* 145 Wn.2d at 239. It is also well-established that mere allegations of discrimination under Title VII or WLAD fail to support a claim for wrongful termination in violation of public policy, especially where those statutes provide their own remedies. *See Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 367, 753 P.2d 517 (1988). Because none of the exceptions to the at-will employment doctrine applied to Mr. Moret, his claim for wrongful termination was properly dismissed with prejudice.

VI. CONCLUSION

Respondents respectfully request that the Court of Appeals affirm summary judgment dismissal of Mr. Moret's claims as a matter of law because Mr. Moret, through admissible evidence, did not raise genuine issues of material fact to preclude summary judgment dismissal.

Dated this 27 day of June, 2016.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 27th day of June, 2016, I caused to be served a true and correct copy of the foregoing via Certified Mail, Return Receipt Requested, and addressed to the following:

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June 27, 2016 - 11:08 AM

Transmittal Letter

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Court of Appeals Case Number: 47768-8

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Respondents' Response Brief

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